

Protest of )  
IMTEC, INC. ) Date: July 5, 1991  
Solicitation No. 104230-91-A-0026 ) P.S. Protest No. 91-26  
)

### DECISION

IMTEC Corporation, through counsel, timely protests the terms of Solicitation No. 104230-91-A-0026 for Package Bar Code Sorting Systems ("PBCS"). The solicitation, issued on December 6, 1990, by the Office of Procurement, Headquarters, had an original offer due date of February 4, 1991, later amended to May 29. IMTEC alleges that the solicitation is restrictive of competition in violation of Postal Service procurement policies and regulations and seeks removal of the restrictive terms in order to give it a "fair and equal opportunity to make its printer/applicator available to those companies competing for the prime contract."

This solicitation is the result of years of planning, testing and development. The objective of the PBCS system is for the Postal Service to have the capability of scanning the address on a package and printing and applying a bar code label containing the correct zip code information. The PBCS is comprised of three major components, omni-directional wide area scanners, an electronic control system, and a printer/applicator. With respect to the printer/applicator, in 1986, the Postal Service Engineering Development Center ("EDC") surveyed all the known manufacturers of similar technology to discuss the Postal Service's requirements. The survey revealed that no printer/applicators were available commercially. The Postal Service then developed definitive performance specifications and advertised in the Commerce Business Daily ("CBD") for vendors interested in developing the system.<sup>1/</sup> The Postal Service provided funding to two companies to build the device. One company supplied a device employing a concept similar to that used by IMTEC where, once the printer makes the label, only the label applicator moves to attach the label to the package. The other company employed a concept similar to that ultimately developed by the Postal Service, where the printing and applying functions are simultaneous and the printer/applicator moves as a unit to apply the label to the package.

The EDC extensively tested the devices until the summer of 1989, when it became clear that neither device met, nor could be modified to meet, the Postal Service's performance specifications. The Postal Service then decided to design and fabricate a

<sup>1/</sup> IMTEC did not respond to this advertisement.

device itself. The devised subsystem of the PBCS consisted of a printer manufactured by Sato America, and further sub-components, including a servo-motor. By February, 1990, the Postal Service had completed and installed its device at its test facility in Greensboro, NC. This equipment exceeded the Postal Service's requirements, nearly doubling the proposed throughput. The Postal Service then prepared and issued the instant solicitation, incorporating its device.

The solicitation gives general information about the PBCS system at section 5.0 of the specifications, relating that the Postal Service tested a prototype PBCS in April and May, 1990, in Greensboro, NC. The tested system consisted of the following:

an omnidirectional scanner capable of reading an Interleaved 2 of 5 [bar] code or a [Bar] Code 39, and a printer/applicator which printed and applied a bar code label to the top of the package. The system also contained a system controller which provided the interface and coordination between the overhead scanner, printer/applicator and the existing BMC [Bulk Mail Center] system. . . . As tested the PBCS system consisted of a commercial scanner, a USPS developed printer/applicator and a system controller.

The objective of the prototype field test was to "document the operation of the proposed bar code label applicator for comparison with the existing manual keying work station operation." The operational test performance data forms the basis for the performance specifications included in the solicitation.

Section 6.0, General Technical Requirements, states that the Postal Service will provide the drawings used to build the prototype design. It goes on to state that **"[t]hese drawings are provided for information only. The USPS does not warrant, or otherwise guarantee the drawings for any purpose whatsoever"** (Emphasis in original).

Section 6.1 of the specifications, Product Engineering, states:

The USPS is providing as part of this requirement the Engineering Drawings for the prototype PBCS System tested in Greensboro. These Engineering Drawings will include the source code for the USPS designed items tested. Source Control Drawings - E1007181, E1007182, E1007183 and E1007184 which form a part of the Engineering Drawing Package of the SOW must be utilized in the final product engineered Package Bar Code Sorting System unless specific authorization to deviate from these Source Control Drawings is granted by the Contracting Officer after contract award. Prior to submitting a Request for Deviation, the contractor must demonstrate to the USPS the proposed change. Requests for deviations, after award, will only be considered when they are accompanied by a detailed design supported by an indepth [sic] performance benefit analysis which demonstrates that the proposed deviation will result in a PBCS system which exceeds the performance requirements, including reliability and maintainability, specified in this document.

Section 6.19 of the specifications, Printer/Applicator Requirements, states that the printer/applicator was designed and built by the Postal Service, contains many unique

features, and is in the process of being patented. It states that the PBCS must be engineered in accordance with the specified requirements, including the designs and components as specified in the Engineering Drawings and as defined in section 6.1. Finally, sections 7.8 through 7.10 outline the performance requirements for the printer/applicator.

Section M of the Solicitation, Evaluation and Award Factors, states that:

This is a major program in which the contractor will be required to repackage and produce the following:

1. Approximately 350 copies of a complex electro-mechanical pneumatic device called a printer/applicator.
2. Approximately 550 copies of a complex electronic control system based on multiple microprocessors of the 80286 class.
3. Approximately 550 omni-directional, wide area scanners. The contractor will be required to integrate these devices into a functional system and install these systems in twenty one Bulk Mail Centers. Installation is not to interfere with the normal processing of mail at the BMCs. All of this work is to be completed within 24 months after contract award.

A number of potential suppliers of both the major component parts and sub-components filed bid protests against the terms of the solicitation, alleging that the identified single sources for the printer/applicator, the servo-motor, and the omni-directional wide area scanner were unduly restrictive of competition. Following discussions between the contracting officer and some of the protesters, the contracting officer issued two amendments in an attempt to resolve these allegations:

Amendment A04, issued on March 6, 1991, incorporated Provision 2-4, "Brand Name or Equal (October 1987)." That provision states that the Postal Service will consider proposals offering equal products if they are determined to be equal in all material respects to referenced brand name products. The amendment also incorporated Clause 2-21, "Component Parts (October 1987)," which states that:

The description of any component parts in the specification by use of brand or manufacturer's names indicates that there are no other acceptable sources for those components known to the Postal Service. Such descriptions are not meant to be restrictive, however, and the contractor may ask the contracting officer to recognize a contractor-proposed component not included in the specifications as equal to one of the specified components and permit its substitution . . . .

Amendment A05, issued March 20, amended section 6.1 of the specifications as follows:

The USPS is providing as part of this requirement the Engineering Drawings for the prototype PBCS System tested in Greensboro. These Engineering Drawings will include the source code for the USPS[-]designed items tested. The final

product engineered Package Bar Code Sorting System must use the following Source Control Drawings - E1007181, E1007183, E1007184, or equal, which form a part of the Engineering Drawing Package of the SOW. Prime contract offerors may request substitutions in accordance with the Components Clause and Brand Name or Equal provision of the solicitation, provided the proposed equal components pass a USPS approved test to demonstrate the components are, in fact, equal to the components described in the specification.

With respect to the omni-directional scanner, the amendment identifies a brand name item, provides the salient features, and a test protocol. For the servo-motors, three brand name products are listed. The amended E-1007184 source-control drawing for the printer/applicator states, with reference to the printer, that "[o]nly the item described on this drawing when procured from the vender [sic] listed hereon [SATO America, Inc.] is approved by the USPS for use in the applications specified hereon. A substitute item shall not be used without prior approval by USPS." The general requirements states that the Postal Service-designed printer/applicator "is unique in that the printer itself is moved as apposed [sic: opposed] to the printer being stationary with the applicator being the only moving part. The production system shall incorporate this concept." The drawing lists the salient features and cautions that "meeting these criteria, in and of themselves, does not guarantee proper performance in the system. It is the sole responsibility of the prime contractor to assure system compatibility [sic] and system performance including the proper performance of all subsystems."

As a result of Amendment A05, all protests were withdrawn but the subject protest. IMTEC is a manufacturer of printer/applicators utilizing a stationary printer and a moveable applicator.<sup>1/</sup> In its protest, IMTEC alleges generally that the solicitation is illegal, irrational, and in violation of Postal Service procurement regulations. It claims that identifying a single source for the printer is an arbitrary and capricious act and improperly excludes IMTEC from competing.

IMTEC alleges several specific violations of the Postal Service Procurement Manual. It claims that the solicitation violates PM 1.7.1,<sup>1/</sup> asserting that the identification of only one source for the printer is illegal because competition is feasible. It alleges that its existing equipment can satisfy all performance requirements. It states that its

<sup>2/</sup> IMTEC filed its original protest, assigned P.S. Protest No. 91-05, on January 15. Proceedings were stayed pending discussions between the protester and the contracting officer. After issuance of Amendment A05, IMTEC, through counsel, timely filed a second protest which incorporated by reference the original protest. Accordingly, P.S. Protest No. 91-05 is dismissed as moot.

<sup>3/</sup> Section 1.7.1, "Competition," states:

- a. Purchases must be made on the basis of adequate competition whenever feasible. Adequate competition means the solicitation and participation of a sufficient number of sources to ensure that the price paid is fair and reasonable. The requirement for adequate competition does not preclude the restriction of competition in appropriate situations, such as the rotation of source lists when there are a large number of qualified suppliers . . . or purchases from approved sources or prequalified contractors. . . .
- b. Rules for noncompetitive procedures are set forth in PM 4.2.1.d and 4.3.

equipment is less expensive, less complicated, has fewer moving parts, requires less power, is more efficient and is state of the art. For these reasons, IMTEC concludes that excluding it from competition will ensure that the Postal Service will not receive a fair and reasonable price. It also asserts that identifying only one source is not a reasonable restriction of the type set forth in PM 1.7.1 a.

IMTEC also complains about the form of the specifications, alleging that the solicitation violates PM 2.3.2.<sup>4/</sup> It contends that designating a sole source supplier contradicts the standards of a performance specification, which should notify the offeror only of the results expected. IMTEC contends that the requirements for the printer/applicator, a commercial product, should have been written using product descriptions instead of specifications. In any event, IMTEC claims that the five conditions for a product description, required by PM 2.3.3 c., have not been met.<sup>4/</sup> Specifically, IMTEC claims

<sup>4/</sup> PM 2.3.2, Types of Specifications, states in pertinent part:

a. Specifications may be stated in terms of:

\* \* \*

2. Performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards;

\* \* \*

b. Whenever standard or modified commercial products will meet Postal Service requirements, product descriptions (see 2.3.3) must be used instead of specifications.

PM 2.3.3, Product Descriptions, states in pertinent part that:

a. When standard or modified commercial products will meet Postal Service requirements, a product description must be used that includes:

1. A common generic identification of the item;
2. Known acceptable brand-name products, identified by model or catalog number, and the commercial catalogs in which they appear;
3. The name and address of the manufacturer, producer, or distributor of each brand-name product referenced; and
4. A description of any modification required.

<sup>5/</sup> PM 2.3.3 c. states:

Except for construction specifications, if fewer than three acceptable brand-name products are specified, or if proposals for products other than those specified will be considered:

1. The product description must include a description of the item's essential characteristics, such as kind of material, size or capacity, equipment with which the items [sic] is to be used, and restrictive operating environmental conditions;

that there is no list of essential characteristics, no "or equal" designation and no approval by the Technical Review Division.<sup>17</sup>

IMTEC contends that Amendment A05 is an attempt to circumvent the necessity to allow competition for the printer/applicator. IMTEC acknowledges that the amended specifications and drawings allow for an equal product with respect to the printer and list the salient features of the printer/applicator system, but maintains that when salient features result in a sole source, they are illegal, absent a rational basis. It also contends that increasing competition for the sub-components does not satisfy the requirements of PM 2.3.4, as the sub-components are not line items. IMTEC avers that in order to comply with PM 2.3.4, the Postal service must allow all potential competitors the opportunity to have their equipment proposed by the prime contractor.<sup>17</sup>

IMTEC alleges that the contracting officer failed to articulate a rational basis for insisting on the Postal Service design. The protester suggests that the solicitation is tainted with the "Not Invented Here" syndrome, driven by the Postal Service's commitment to its own design and by the fear that in a comparison to IMTEC's design, it would come out second best. IMTEC contends that the Postal Service would not discard its own design no matter how poorly it performed. The protest concludes that IMTEC should be treated no differently than the protester that complained that the omnidirectional scanner was unduly restrictive,<sup>17</sup> notwithstanding that here a Postal Service design is at issue, and it should be given the opportunity to test its equipment to determine which design represents the best value to the Postal Service.

2. The brand names in the product description must be followed by the words "or equal";
3. Spaces must be provided for offerors to identify the manufacturer's brand names and model or catalog numbers proposed . . .
4. The solicitation must include Provision 2-4, **Brand Name or Equal** and
5. If the requirement is estimated to exceed \$50,000, the product description must be approved by the General Manager, Technical Review Division, Procurement and Supply Department, before the solicitation is issued.

<sup>6/</sup> Amendment A05 added the salient features to the printer/applicator engineering drawing and allowed the proposals of equal products. Thus, the first four requirements have been met and these issues are, therefore, moot. See note 3. With respect to the fifth requirement, without evidence to the contrary we apply the presumption of correctness to the contracting officer's actions and fail to find that the protester has overcome that presumption. Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989.

<sup>17</sup> PM 2.3.4, "Component Parts," states that: "When component parts in a deliverable contract line item are described in the specifications by a brand or manufacturer's name, the contract must include Clause 2-21, **Component Parts**" As recited, this clause was incorporated in Amendment A04.

<sup>8/</sup> The protester there had been involved in the earlier development and testing phases of the program. It withdrew its protest after the issuance of Amendments A04 and A05 as the amendments provided an opportunity for a prime contractor to offer an alternate scanner, provided they passed the requirements of the newly developed test protocol.

Next, IMTEC complains that the solicitation violates PM 1.8.1, "Anticompetitive Practices."<sup>9/</sup> It acknowledges that PM 1.8.1 appears to apply to actions by contractors, and that the actions of the Postal Service are not included in the listed examples, but claims that in this situation, the Postal Service's actions will "eliminate competition and restrain trade" at the subcontractor level.<sup>10/</sup> Finally, IMTEC claims that the solicitation violates PM 10.3, "Buy American Policy," as the Sato America printer is not a domestic end product, but is manufactured in Japan.<sup>11/</sup>

The contracting officer refutes IMTEC's allegations that the solicitation violates PM 1.7.1, stating that the Postal Service made every attempt to solicit and encourage market competition for this component. Only after all attempts to acquire the device competitively failed did the Postal Service resort to its own design. The contracting officer also states that, based on the available information, IMTEC's equipment clearly does not meet the Postal Service's requirements.<sup>12/</sup> Additionally, he contends that it is

<sup>9/</sup> PM 1.8.1 states in pertinent part that:

- a. An anticompetitive practice is [any practice] designed to eliminate competition or restrain trade. Such practices include collusion, follow-the-leader pricing, rotated low price proposals, sharing of business, identical prices, and any other device intended to deprive the Postal Service of the benefits of competition. These practices may violate Federal antitrust laws and be subject to prosecution by the Attorney General. Proposals suspected of reflecting anticompetitive practices may be rejected . . . .

<sup>10/</sup> Our forum is designed to address bid protests, not allegations concerning restraint of trade, collusion, or antitrust violations. Coplon Engineering & L. Parry, Inc., P.S. Protest Nos. 89-29, 89-32, and 89-33, August 8, 1989; Liberty Carton Company, P.S. Protest No. 85-35, July 30, 1985 (citing Western Publishing Company, Inc., P.S. Protest No. 84-23, April 10, 1984). Accordingly, we dismiss IMTEC's allegations with respect to this issue.

<sup>11/</sup> The Buy American Policy requires that "domestic-source end products" be purchased, subject to various exceptions. A product is a "domestic-source end product" if the "cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components." PM 10.3.2 b.3. "End products" are defined as "[a]rticles, materials, and supplies to be purchased for Postal Service use." PM 10.3.2 b.1. "Components" are defined as "[a]rticles, materials, and supplies directly incorporated in end products." PM 10.3.2 b.2.

Although "it is within our jurisdiction to consider whether the evaluation factors called for by the Postal Service's Buy American policy have been correctly applied," International Business Machines Corporation, P.S. Protest No. 90-66, January 11, 1991, IMTEC has failed to meet its burden of proving that the Sato America printer is a significant portion of the PBCS such that invocation of the Buy American provisions are applicable. As defined in PM 10.3.2, the PBCS, not the Sato America printer, is the "end product" requiring evaluation to determine if 50 percent of its components are of domestic origin. The Sato America printer is only a "component" as defined in PM 10.3.2 b.2. Accordingly, the Buy American provisions do not apply to the Sato America printer except to the extent that it relates to the PBCS as a whole.

<sup>12/</sup> With its original protest, IMTEC included sales literature for its Models 3110, 3130 and 3600. The contracting officer made a comparison between the performance of these models and the Postal Service's specifications. The contracting officer determined that none of these models would meet the

not a violation of regulations to identify a single source for the component when market research and unsuccessful testing reveal that only one source meets the Postal Service's minimum requirements.

With respect to IMTEC's allegations that its equipment would be less expensive, the contracting officer states that the Postal Service purchases equipment based on the best value to it and that alternate equipment not meeting the Postal Service's requirements, despite an alleged lower cost, would not represent the best value to the Postal Service.

The contracting officer notes that the lack of success in acquiring either a commercial item or having other vendors develop the item led to delays in producing the PBCS. He states that there was a need to keep the program on track, even if it meant identifying a single source for the printer/applicator. He states that once the Postal Service was successful in designing its own equipment, there was no rational reason to delay the program. Additionally, the contracting officer notes that the new postal rate increases include discounts to mailers applying bar codes to their packages and that the Postal Service is obligated to be in a position to support these discounts.

Next, the contracting officer disagrees that the solicitation does not set forth performance specifications, as defined by PM 2.3.2, contending that performance specifications were developed and provided to the vendors that responded to the original advertisement in the CBD. He states that PM 2.3.3 is not applicable to this solicitation, but that PM 2.3.4 and Clause 2-21 are controlling. In any event, the contracting officer states that the amendment did not circumvent any regulations, but that the Postal Service has acted to maximize competition within the constraints of its minimum needs in order to eliminate even the perception of unfairness. He states that, as amended, two sub-components of the printer/applicator list three approved sources and the third allows for a brand name or equal product and lists the salient features. He maintains that as amended, the solicitation does not prohibit IMTEC from offering a printer/applicator, it merely prevents it from offering one of its existing models. The contracting officer states that use of the Postal Service design does not lack a reasonable basis, maintaining that where a design proposed is found to be inadequate, the requirement for a particular design is not unduly restrictive.<sup>13/</sup>

Postal Service's minimum requirements. IMTEC subsequently supplied literature about its newest model, Model 3900, including two video tapes and what it termed "official published specifications," which were actually labeled "preliminary specifications." The contracting officer and the technical staff reviewed the specifications and the videos. The contracting officer concluded that the IMTEC model 3900 applied labels with 87% accuracy, while the Postal Service requirements are for 98% accuracy. IMTEC claims, however, that through discussions with the Postal Service prior to issuance of Amendment A05, the Postal Service learned that IMTEC's Model 3900 does meet the performance requirements of the solicitation. In fact, IMTEC claims that the Postal Service cannot identify a single performance standard that IMTEC's Model 3900 cannot meet.

<sup>13/</sup> In support of his position, the contracting officer relies on S.H. Demarest, P.S. Protest No. 84-1, February 9, 1984, and LubeCon Maintenance Systems, Inc., P.S. Protest No. 84-78, December 17, 1984.



The contracting officer denies that the solicitation suffers from the "Not Invented Here Syndrome," averring that IMTEC has chosen to overlook the Postal Service's efforts to generate competition. According to the contracting officer, the Postal Service design was a result of "years of experience and intimate knowledge of the failures, strengths and weaknesses of the two designs." He states that the design is extremely successful, performs very well in live mail runs, and has been in continuous operation for over a year with no significant malfunctions or failures. The contracting officer concludes that the issue is that IMTEC cannot propose equipment based on the concept preferred by the Postal Service and that this alone does not make the solicitation unduly restrictive. The contracting officer regrets the possible exclusion of a prospective supplier, but insists that the fact that IMTEC's existing models do not conform to the Postal Service's requirements does not create a rational basis for now allowing a nonconforming, unproven product into the competition.

IMTEC submitted extensive comments on the contracting officer's statements, claiming that they are irrelevant, nonresponsive, and arbitrary and capricious. It asserts that the contracting officer first rejected IMTEC's protest solely on the basis of the inadequacy of its equipment and now bases its determination on the fact that IMTEC's equipment does not meet the design requirements.

IMTEC claims that for several months it has had equipment, specifically its Model 3900, that can meet the Postal Service requirements. IMTEC also states that it was unfair for the Postal Service to evaluate its equipment based solely on sales literature which led to an incorrect conclusion that IMTEC's equipment could not meet the Postal Service's requirements. IMTEC claims that it is arbitrary to come to such a conclusion when its equipment is available for testing. It suggests that the contracting officer refuses to see the inconsistency between the solution arrived at with the omni-directional scanner protest and this protest. In that situation, proposed, alternative commercial scanners will be tested by the prime contractor. IMTEC strongly recommends that the same solution be provided here. IMTEC insists that it is completely irrational for the Postal Service to continue to cling to its own design solely because it found no qualified printer/applicator in 1986 and thus concludes that no viable alternative exists today.

It asserts that the contracting officer erred when he based his determination to restrict the printer/applicator on the basis of historical data and specifically complains about the nature of the tests upon which the contracting officer relies, claiming that they were neither "flyoff" tests, nor pass/fail tests. It asserts that the products of the two companies funded to develop the system could have failed for many reasons and that this is not a valid basis for restricting competition now. IMTEC states that feasibility tests, such as the ones conducted in Greensboro, should not be the basis for excluding a potential supplier of the printer/applicator and maintains that the decision must be based on the state of affairs at the time of the solicitation. IMTEC regrets that it did not respond to the CBD advertisement in 1986, but contends that this is not a valid basis for rejecting it now.

IMTEC alleges that there is no support for the notion that allowing IMTEC to compete will delay the program. It notes that while the Postal Service printer/applicator is still in the prototype phase, IMTEC's Model 3900 is ready to be placed into production and can be delivered ahead of any delivery schedule in the solicitation. Furthermore, IMTEC claims that the Postal Service will incur no added risk by including it in the

competition. It notes that Section 6.0 of the specifications places total responsibility for system performance on the prime contractor and that the Postal Service refuses to warrant the drawings. It also notes that the extensive testing required before acceptance of the system eliminates any risk, but offers to include a liquidated damages clause in the contract as added insurance.

IMTEC acknowledges that, theoretically, it could redesign and remanufacture its product to meet the Postal Service's requirements, but contends that the issue is whether it should be required to do so, or put another way, whether the Postal Service design is required to meet the Postal Service's minimum needs.<sup>14/</sup>

With respect to its allegations concerning PM 2.3.3, IMTEC claims that despite the contracting officer's statement that this provision does not apply to this procurement, the addition of Provision 2-4 in Amendment A04 necessarily made it applicable and its requirements must be met. IMTEC agrees that the printer/applicator falls under Clause 2-21, "Component Parts." However, IMTEC alleges that with these additions, the contracting officer realized that IMTEC would be able to offer its component. It claims that the contracting officer, fearing this very development, then "moved the goal posts" with the issuance of Amendment A05 to restrict the solicitation on the basis of design instead of the performance requirements.

For the above reasons, citing Pitney Bowes, Inc., P.S. Protest Nos. 90-38 through 90-45, September 4, 1990, IMTEC claims that the Postal Service has failed to establish its prima facie case that the restrictions it imposes are reasonably related to its minimum needs. Next, IMTEC claims that, in any event, the requirements are clearly unreasonable. The protester lists several reasons in support of this contention, all of which have been discussed above. It relies on Data Team, Inc., Comp. Gen. Dec. No. B-233676, 89-1 CPD & 355, April 5, 1989, in support of its position. IMTEC interprets that case as holding that the contracting officer erroneously relied on limited experience, industry reports, and technical data in concluding that the protester's product was inadequate.<sup>15/</sup> IMTEC asserts that the same is true here and points to the contracting officer's refusal to test IMTEC's equipment as being clearly unreasonable. It uses a quote from Data Team to support the proposition that the adequacy of the agency's position will be examined "not simply with regard to the reasonableness of the rationale asserted but also the analysis given in support of these reasons . . . to assure that the agency's explanation will withstand logical scrutiny." Id. IMTEC encourages this office to embrace the GAO's approach and evaluate the contracting officer's analysis underlying his decision. IMTEC is convinced that this will show that the contracting officer's determination is clearly unreasonable.

<sup>14/</sup> IMTEC cites to Airport Markings of America, Inc., et al., Comp. Gen. Dec. No. B-238490 et al., 90-1 CPD 543, June 8, 1990, for the proposition that the issue is not whether a potential competitor can surmount the restrictive barrier to competition, but whether the barrier is necessary to meet the minimum needs of the government.

<sup>15/</sup> In fact, in Data Team, the Comptroller General found fault with the fact that the contracting officer did not rely on technical data or industry reports and sustained the protest on the basis that the agency's limited experience with discontinued equipment was insufficient.

At a protest conference, IMTEC reiterated its position, stressing that the contracting officer failed to establish a prima facie case that the restriction is reasonably related to the Postal Service's needs. IMTEC contends that the contracting officer here has also failed to articulate a rationale for the restriction it imposes.

After the protest conference, IMTEC submitted an affidavit by IMTEC's president, Mr. James Williams. Mr Williams stated that he had been involved in the development of the IMTEC Model 3900 since March 9, 1990. He states that he is intimately familiar with the subject solicitation and that the Model 3900 meets or surpasses the throughput requirements of the Postal Service design in every instance where there is available performance history for the Model 3900. He states that he is unaware of any technical reason to conclude that its equipment would encounter unique performance problems that would not also be present with the Postal Service design.

### Discussion

IMTEC challenges the restrictive nature of the specifications for the printer/applicator component.<sup>16/</sup> Our standard of review of the restrictive nature of the specifications is narrow:

[t]he determination of the government's minimum needs, the method of accommodating them and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. Generally, when a specification has been challenged as unduly restrictive of competition, it is incumbent upon the procurement agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Pacific Bell, P.S. Protest No. 90-51, December 21, 1990 (citing Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984 (quoting Amray, Inc., Comp. Gen. Dec. B-208308, 83-1 CPD & 43, January 17, 1983)). Here, the contracting officer has made a prima facie showing that the design is reasonably related to its actual needs. According to the contracting officer's report, the Postal Service made every effort to solicit and encourage competition for the component. Only after the vendor-designed devices failed the Postal Service's performance specifications did the Postal Service resort to developing its own design. The contracting officer established that the Postal Service's choice of design was based on its comparison of the strengths and weaknesses of the two known designs.<sup>17/</sup> Thus, having determined that the contracting officer

<sup>16/</sup> To the extent that IMTEC complains that the requirements for the printer/applicator should have been written using product descriptions instead of specifications, we treat this as essentially the same as its complaint that the solicitation is unduly restrictive.

<sup>17/</sup> Although the rationale for choosing one technological concept over the other, preferred by IMTEC, is missing from the contracting officer's statement, he has demonstrated that the operational requirements of the Postal Service were considered and are the basis of the restriction. S. H. Demarest, P.S. Protest

has made a prima facie showing, we now must inquire whether the design of the printer/applicator is clearly unreasonable.

IMTEC's contention that the design of the printer/applicator is irrational is without merit. The Postal Service has made a good faith effort to seek competition on this project. The Comptroller General has noted:

As a general matter, the existence of procedures which are reasonably calculated to provide potential offerors with an opportunity to demonstrate that their products meet an agency's minimum needs at some stage of the planning process or of the procurement process itself is a necessary precondition to the valid imposition of solicitation restrictions which limit competition to the products of one or more manufacturers.

Advanced Seal Technology, Inc., Comp. Gen. Dec. B-241924, 91-1 CPD & 264, March 8, 1991 (citations omitted). Here, the Postal Service provided potential offerors with an opportunity to demonstrate that their products met the Postal Service's minimum needs before restricting the design of the printer/applicator. In particular, the Postal Service advertised in the CBD for vendors interested in developing the system in 1986, and it was only after the vendor-designed prototypes failed to meet performance specifications that the Postal Service determined that an in-house design was necessary. We cannot conclude that the contracting officer's decision to restrict the design of the printer/applicator to the in-house design was clearly unreasonable when presumably competent vendors could not supply a component that met the Postal Service's requirements. See Pierce Coal Sales International, Comp. Gen. Dec. B-217051, 85-1 CPD & 258, March 1, 1985 (restriction based on agency's test data which differs from the technical conclusions of the protester is insufficient to over-turn the agency's determination of its needs); see also Pitney Bowes, Inc., P.S. Protest Nos. 90-38 through 90-45, September 4, 1990 (quoting Bowers Reporting Company, Comp. Gen. Dec. B-185712, 76-2 CPD & 144, August 10, 1976 (a reasonable decision to limit how services of a technical nature are to be supplied will not be overturned, and such restrictions "may properly be based on actual experience by the agency"))).

In addition, we do not consider the exclusion of a potential offeror, even one that may be able to meet the functional requirements of the Postal Service, as evidence, in and of itself, that a specification is unduly restrictive:

if a specification is otherwise reasonable, the fact that one or more potential offerors may be precluded from participating in the solicitation does not render its terms restrictive if they reflect the legitimate needs of the procuring activity.

Pacific Bell, P.S. Protest No. 90-51, December 21, 1990 (citing International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989).

The essence of IMTEC's argument is that its design is more efficient and, if approved, will ensure that the Postal Service pays a reasonable price for the component. The Postal Service had no knowledge of IMTEC's allegedly equal technology until the time

of the bid protest. Furthermore, other evidence submitted by IMTEC indicates that it obtained the technology well after the Postal Service decided to pursue the in-house design.<sup>17</sup> IMTEC, in sum, asks us to evaluate the contracting officer's otherwise reasonable decision in light of changed circumstances. This we decline to do. We accord great deference to the contracting officer's decision to restrict the design at the time he concluded that no other supplier could meet the Postal Service's minimum needs. Cf. Tom Shaw, Inc., Comp. Gen. Dec. B-214191, 84-2 CPD & 227, August 27, 1984 (denying relief to contractor that filed a protest after award alleging that brand name purchase description was unduly restrictive because the contracting agency's decision to limit the solicitation to a particular brand was reasonably based at the time it was made.) IMTEC's after-the-fact attempt to force the Postal Service to consider its technology is simply too late.

The reasons given for the contracting officer's adherence to his schedule for award justifies his decision not to test IMTEC's design. The Comptroller General has reasoned similarly: "an offeror's right [to the opportunity to demonstrate the adequacy of the protester's product] is limited by the right of the agency . . . not to delay award should it be unable to complete the testing necessary for approval of an alternate." Advanced Seal Technology, Inc., Comp. Gen. Dec. B-241924, 91-1 CPD & 264, March 8, 1991. IMTEC claims that it merely wants that opportunity now and that a prime contractor could easily test its equipment without delaying the delivery schedule of the PBCS. The contracting officer, in contrast, contends that:

since previous testing demonstrated [that] no other printer/applicator manufacturers were able to meet the USPS specifications, and the proposed IMTEC [] advertised performance specifications did not meet the USPS requirements, there was [not], **[n]or is there now** [any] technical reason for delaying the program.

(Emphasis supplied). We do not possess the capability for resolving factual disputes such as the one about delay presented here. See Cohlmia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988. Rather, we must defer to the technical judgments of the contracting officer. See Daniel J. Keating Construction Company, P.S. Protest 89-92, March 1, 1990 ("The technical determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence"). Because a presumption of correctness attaches to the statements of the contracting officer, the pro-tester shoulders a considerable burden in attempting to defeat the contracting officer's technical judgments. Id. Here, the contracting officer and technical advisors, having examined literature and videos submitted by IMTEC, have concluded that IMTEC would not meet the performance specifications. The contracting officer could reasonably conclude that, given these performance deficiencies, delay in contract award would result. Notwithstanding IMTEC's claim that the prime contractor, rather than the Postal Service, could conduct

<sup>18/</sup> In his affidavit, James R. Williams, President of IMTEC stated that he had only "been involved in the development, marketing, and production of the IMTEC Model 9000 Printer/ Applicator since March 9, 1990," suggesting that IMTEC did not possess the capability to provide the component until that time. The Postal Service opted to pursue the in-house design in the summer of 1989. The prototype was completed by February 1990.

the testing after award, we defer to the contracting officer's conclusion that evaluation of the IMTEC proposal might result in delays. Thus, following the rule of Advanced Seal Technology, the contracting officer is justified in not testing IMTEC's product because he has determined that this would result in unnecessary contract delay. In sum, we deny IMTEC's claim because IMTEC has not met its burden in proving the contracting officer's actions unreasonable.

This protest is denied.

**[Signed Michael J. VanDamm for]**

William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[Compared to original 5/17/95]**